LARRY L. LOWENSTEIN

IBLA 81-143 August 25, 1981, Decided

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying a petition for reinstatement and equitable adjudication of homesite entry AA-8551.

Vacated and remanded.

1. Notice: Constructive Notice

   Where an authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. 43 CFR 1810.2.

2. Alaska: Homesites

   Where a homesite entryman files a notice of location, stakes out his site, and offers convincing evidence on appeal that he cut timber on the site prior to a withdrawal of the subject lands from all forms of appropriation, sufficient occupation has taken place to establish in the entryman valid existing rights prior to withdrawal.

3. Alaska: Homesites

   Where a homesite entryman dwells in a log and visquine tepee with wooden floor and wood stove for a period not less than 5 months per year for 3 years, and such residency is completed within 5 years of the filing of a notice of location,

the residence requirements imposed by 43 U.S.C. § 687a (1976) have been met.

4. Alaska: Homesites -- Equitable Adjudication: Substantial Compliance

Equitable adjudication may be invoked to permit consideration of a homesite purchase application that was not filed within the time required, where substantial compliance with the law has been made and valid existing rights were established before the land was withdrawn by Public Land Order 5418.

APPEARANCES: Larry L. Lowenstein, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Larry L. Lowenstein appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated October 16, 1980, denying his petition for reinstatement and equitable adjudication of homesite entry AA-8551. BLM denied this petition because of appellant's failure to:

1. provide a complete land description as required by the regulations;

2. adequately occupy the land prior to PLO 5418 withdrawing lands on March 24, 1974;

3. keep BLM informed of his current correct address;

4. timely file his application to purchase;

5. state the reasons for the late filing of the application to purchase;

6. provide a habitable house during the statutory five year period of the claim.

Lowenstein's efforts to obtain homesite AA-8551 began on October 24, 1973, the date set forth on appellant's notice of location as the date of settlement or occupancy. This notice was filed by appellant on November 1, 1973, for the site at issue, a 5-acre parcel in unsurveyed sec. 19, T. 9 N., R. 3 E., Seward meridian, Alaska. Improvements as of November 1, 1973, were limited to appellant's staking out his homesite on the sides of trees.

Appellant's notice of location was filed pursuant to the Act of May 26, 1934, c. 357, 48 Stat. 809, amending section 10 of the Act of May 14, 1898, c. 299, 30 Stat. 413, as amended. 1/ The authority for appellant's filing is presently found at 43 U.S.C. § 687a (1976), repealed by section 703(a) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 (1976), effective on and after the tenth anniversary of the date of approval of FLPMA, October 21, 1976. Section 687a provides in part:

> [A]ny citizen of the United States, after occupying land of the character described as a homestead or headquarters, in a habitable house, not less than five months each year for three years, may purchase such tract, not exceeding five acres, in a reasonable compact form, without any showing as to his employment or business, upon payment of $2.50 per acre, under rules and regulations to be prescribed by the Secretary of the Interior.

Subsequent legislation provided that a locator seeking to take advantage of section 687a must file a notice describing his claim in the manner specified by 43 U.S.C. § 270 (1970) 2/ within 90 days of the

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1/ The Act of May 14, 1898, was also amended by the Act of Mar. 3, 1927, c. 323, 44 Stat. 1364. Section 1328(a)(1) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371 (to be codified in 16 U.S.C. § 3215) provides in part as follows:

"Subject to valid existing rights, all applications made pursuant to the Acts of June 1, 1938 (52 Stat. 609), May 3, 1927 (44 Stat. 1364), May 14, 1898 (30 Stat. 413), and March 3, 1891 (26 Stat. 1097), which were filed with the Department of the Interior within the time provided by applicable law, and which describe land in Alaska that was available for entry under the aforementioned statutes when such entry occurred, are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraph (3) or (4) of this subsection [dealing with protests by third parties or relinquishment by the applicant], or where the land description of the entry must be adjusted pursuant to subsection (b) of this section, in which cases approval pursuant to the terms of this subsection shall be effective at the time the adjustment becomes final." Because appellant's entry was authorized by the Act of May 26, 1934, as an amendment of the Act of May 14, 1898, supra, this section may be applicable. On remand, this possibility should be taken into consideration if it could influence the final disposition of the matter.

2/ The relevant portions of this statute read as follows:

"If any of the land so settled upon, or to be settled upon, is unsurveyed, then the land settled upon, or to be settled upon, must be located in a rectangular form, not more than one mile in length, and located by north and south lines run according to the true meridian; the location so made shall be marked upon the ground by permanent monuments at each of the four corners of the said location, so that the boundaries of the same may be readily and easily traced; that within

date of initiation of the claim. An application to purchase a claim, along with the required proof or showing, must be filed within 5 years after the filing of the notice of location. 43 U.S.C. § 687a-1 (1976).

By letter of January 28, 1974, BLM notified Lowenstein that his homesite was "incomplete," enclosing in this letter a portion of a township map showing homesite AA-8551 as plotted on BLM records and also a copy of instructions for marking and describing unsurveyed lands. This letter, although mailed to appellant's address of record, was returned to BLM marked "Moved -- Left No Address."

Thereafter by decision dated March 28, 1975, BLM held Lowenstein's notice of location unacceptable for recordation and closed the case. BLM based this decision upon the fact that appellant had not established valid existing rights prior to the withdrawal of the subject lands from all forms of appropriation by Public Land Order (PLO) 5418 on March 28, 1974. This finding was in turn based upon a field examination by BLM showing no improvements on the land by appellant and no signs of use on the site as of July 30, 1974. The decision was mailed to appellant's address of record and, as with BLM's letter of January 28, 1974, was returned to BLM marked "Not Deliverable as Addressed -- Unable to Forward." Appellant alleges that he was unaware of this decision until December 8, 1975, when he visited BLM's office to learn the status of his homesite. Appellant's address on that day, as set forth on a form used to request examination of his file, was identical to that used by BLM on its previous correspondence.

After this visit with BLM late in 1975, the record reveals sparse contact between appellant and BLM until April 2, 1979, when Lowenstein was personally served with a trespass notice alleging an unlawful enclosure of the public lands. On the following day, appellant petitioned for the reinstatement of his homesite. This petition recited many of the facts above and also set forth appellant's allegation that he had cut trees on the homesite as early as November 1973. The petition further alleged that during late summer and fall of 1974, appellant lived in a tent on the land and cut some 80 trees in preparation for a log cabin. Construction of the log cabin could not begin, he maintains, until the logs had aged for 1 year. During construction of this cabin, Lowenstein lived in a log and visquine tepee and alleges

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ninety days from the date of settlement on surveyed or unsurveyed lands a notice shall be filed by or on behalf of the settler for record in the United States land office for the district in which the land is situated. Said notice shall contain the name of the settler and the date of the settlement, and such a description of the land settled upon, if surveyed, by legal subdivisions, section, township, and range, or, if unsurveyed, by reference to some natural object or permanent monument and by a statement if desired, of the approximate latitude and longitude determined from a map of Alaska, as will identify the land."

occupancy of the site for 5 months per year in 3 out of 5 years. The log cabin was completed in October 1978. Appellant also refers to BLM's letter of January 28, 1974, and contends that the original legal description of his homesite was written by a BLM employee and accurately plotted on two BLM maps. On April 5, 1979, appellant hand-delivered a petition for equitable adjudication citing the provisions of 43 CFR 1871.1.

[1] BLM's rejection of appellant's petition for reinstatement and equitable adjudication is the occasion for this appeal. In its rejection decision of October 16, 1980, BLM correctly points out that its service by certified mail of correspondence dated January 28, 1974, and March 28, 1975, was in accordance with the applicable regulation, 43 CFR 1810.2. This regulation provides that the addressee of a communication will be deemed to have received such communication, whether or not received in fact, if it was delivered to his last known address of record in the appropriate office of BLM. Appellant responds by stating that his address of record was accurate, but receipt of a certified letter was impossible because he was either on the homesite itself, where no delivery is made, or he was "staying out" 2 months at a time, away from a post office.

Appellant's inability to receive mail from BLM prevented him from consulting BLM to determine in what way the legal description of his homesite was incomplete. An undated field report noted that appellant's homesite corners were not located on the ground. An amended legal description, made in April 1979 with BLM's help, basically restated appellant's original description but described corner #1 with reference to appellant's cabin and a survey monument. From these facts, it is not entirely clear what deficiency BLM had in mind in January 1974 when it notified appellant of his "incomplete" entry. Regulation 43 CFR 2563.2-1(b) requires a homesite to be described "by metes and bounds with reference to some natural object or permanent monument giving, if desired, the approximate latitude and longitude." The legal description used by Lowenstein identified the homesite corners by reference to trees marked with orange arrows. Whatever appellant's deficiency, it appears from the record that BLM knew where appellant's homesite was at all relevant times. A master title plat dated January 11, 1974, some 2-1/2 months after the date of location, shows homesite entry 8551 plotted in sec. 19, T. 9 N., R. 3. In its decision denying equitable adjudication, BLM cited Vernard E. Jones, 76 I.D. 133 (1969), for the proposition that "the purpose of such notice [of location] is to provide the land office with information needed for the administration of public lands and to allow the settler to receive credit for his occupancy and use of the land." Given the fact that BLM was aware of Lowenstein's homesite and knew its location with sufficient detail to plot it accurately on a master title plat, BLM's need for information appears satisfied.

[2] The decision of October 16, 1980, denying equitable adjudication relies in part upon a finding that appellant had established

no valid existing rights in the homesite prior to the site being withdrawn by PLO 5418. This finding was based on prior case law of this Department holding that a notice of location cannot, by itself, protect land from the segregative effect of a withdrawal. Vernard E. Jones, supra. Similarly, the posting of the corners of a tract does not constitute occupation or possession sufficient to confer valid existing rights. Donald J. Thomas, 22 IBLA 210, 212 (1975). Although the decision mentions Lowenstein's statement that he had cut timber on the site prior to the March 28, 1974, the date of withdrawal, the decision does not attach any significance to this fact. Twelve affidavits accompanying appellant's statement of reasons acknowledge appellant's timber cutting efforts during November 1973. In Sandra L. Lough, 25 IBLA 96 (1976), we found that sufficient appropriation of a homesite had occurred where the claimant had cleared a portion of the site, felled a number of logs, and established a camp, consisting of a tent, bedding, and cooking utensils on the site. In Donald J. Thomas, supra, we held that the erection of a 10- by 12-foot tent and the felling of trees preparatory to the construction of a cabin was sufficient appropriation to remove the land from the effect of a withdrawal. The acts of appropriation mentioned in these decisions are those which would disclose to an observer on the ground that the land was under active development. Sandra L. Lough, supra. Where, as here, appellant filed a notice of location, staked out his site, and offers convincing evidence that he cut timber during November 1973, we find that appellant's occupancy of the land was sufficient to establish in him valid existing rights prior to the withdrawal of the land some 4 months later.

[3] As set forth above, 43 U.S.C. § 687a (1976) requires a homesite entryman to occupy his homesite in a habitable house not less than 5 months each year for 3 years. Furthermore, this residency requirement must be met within 5 years after the filing of a notice of location. BLM's decision denying equitable adjudication held that Lowenstein had not met this requirement because he did not occupy a habitable house. In so holding, BLM relied upon Henry E. Reeves, 31 IBLA 242 (1977), rev'd on other grounds, 465 F. Supp. 1065 (D. Alaska 1979), where we found that Reeves' dwelling, a crude cabin of unpeeled logs, plywood floor, and a caved-in corrugated aluminum roof, was not habitable. 31 IBLA at 276. In contrast to Reeves' dwelling, appellant Lowenstein lived in an "elaborate [log and] visquine tepee with a wooden floor and wood stove." Statement of reasons, p. 3. During the years 1976-1978, appellant claims to have lived in this structure in excess of 5 months per year, an allegation which BLM does not dispute. This structure is still standing and is used by appellant to store supplies, despite repeated efforts of several bears to bring it down. Id. at 4.

Most of appellant's energies during this period 1976-78 were devoted to the construction of a log cabin which he built on the site. As set forth in appellant's statement of reasons, this task required him to trudge "a mile down a railroad track, a quarter mile through a swamp and a half-mile up a steep mountain with a 90-pound sack of cement" on his back. Logs weighing 200 lbs. were lugged up a cliff and

into position. The product of appellant's efforts are best-expressed in his own words:

> I don't build things halfway, and I don't have a lot of money. It takes money to buy the chain saw to cut the trees. It takes over a year to age the logs so they won't split. It takes many years to haul up the nine tons of material and equipment over a mile and a half up a mountain. It took two years of college welding to learn the necessary welding skills to make the hardware needed to build the cabin, and then more time to haul that up. At the end of five years I didn't have some thrown-together cabin that will come tumbling down the mountain at the first earthquake. I have pilings chiseled into solid bedrock. I have logs bolted with lag bolts. I have joints bolted together with solid bands of steel. I have a fortress -- my American dream built with my own blood, sweat and tears.

On October 28, 1978, just 3 days before the 5-year residence period would end, appellant moved into this log cabin. Although this cabin is a more substantial dwelling than his log and visquine tepee, we cannot agree with BLM that Lowenstein did not dwell in a habitable house during the 5-year period ending October 31, 1978. Our view here is consistent with that of the Ninth Circuit in Nelson v. Kleppe, 529 F.2d 164 (9th Cir. 1976), holding that a house in deteriorating condition, without electrical connections or heating facilities, may nevertheless be habitable.

[4] BLM was clearly correct in stating that appellant failed to file a timely application to purchase his homesite. The record shows that an application was filed by Lowenstein on June 4, 1980, after being informed by BLM that his case was not ripe for equitable adjudication without such filing. Rene P. Lamoureux, 20 IBLA 243 (1975). An application to purchase a claim must be filed within 5 years after the filing of a notice of location. 43 CFR 2563.1-1(c). In appellant's case, filing occurred more than 6-1/2 years after the filing of his notice of location. Appellant responds to this fact by noting that BLM rebuffed his efforts on October 28, 1978, to file an application to purchase by explaining that his case was closed.

The deficiencies in appellant's efforts to purchase homesite 8551 thus reduce to a failure to describe this homesite completely and a failure to file timely an application to purchase. But for appellant's inability to receive important mail from BLM, the description deficiency could have been immediately corrected. But for BLM's incorrect holding that Lowenstein established no valid existing rights prior to PLO 5418, his case would not have been closed and a timely tender of an application to purchase would not have been refused. Each deficiency has now been corrected. The equitable adjudication which appellant seeks is authorized by 43 U.S.C. § 1161-1163 (1976). Regulations found at 43 CFR 1871.1 define its scope:

> The cases subject to equitable adjudication by the Director, Bureau of Land Management, cover the following:
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> (a) Substantial compliance: All classes of entries in connection with which the law has been substantially complied with and legal notice given, but the necessary citizenship status not acquired, sufficient proof not submitted, or full compliance with law not effected within the period authorized by law, * * * and special cases deemed proper by the Director, Bureau of Land Management where the error or informality is satisfactorily explained as being the result of ignorance, mistake, or some obstacle over which the party had no control, or any other sufficient reason not indicating bad faith there being no lawful adverse claim.

We believe that the instant case shows substantial compliance by appellant in all material matters. As set forth above, whatever deficiencies may have existed in appellant's legal description did not prevent BLM from examining the homesite and plotting it on a master title plat. See Donald J. Thomas, supra at 211. Deficiencies in filing a notice to purchase have been considered by this Board on several occasions and found to be a proper subject for equitable adjudication. In Alvin R. Aspelund, 7 IBLA 165 (1972), for example, appellant made a timely tender of an application to purchase, but was told not to file such application because of a "land freeze." A second tender was tardy.

In Carla D. Botner, 7 IBLA 335 (1972), a tardy filing of an application to purchase was caused by a misunderstanding of critical dates. Therein, we stated that equitable relief may be afforded where a claimant has substantially complied with the requirements of the headquarters site law, but has failed through an error arising out of ignorance, accident, or mistake, to file an application for patent within the 5-year period. Other cases in harmony with these principles include Richard Lee Farrens, 7 IBLA 133 (1972); Elizabeth Hickethier, 6 IBLA 306 (1972); and C. Rick Houston, 5 IBLA 71 (1972).

We believe that Lowenstein's homesite entry should have been considered by BLM under principles of equitable adjudication. His good faith is apparent throughout the record. In 1895, Mr. Justice Brewer wrote, "The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. Ard v. Brandon, 156 U.S. 537, 543 (1895). We believe that appellant's entry should be reconsidered in light of this statement.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision

of the Alaska State Office is vacated and the case is remanded for action consistent herewith.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Douglas E. Henriques
Administrative Judge